A

NOR NYAWAI & ORS

v.

TATAU LAND SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: Q-02-2167-09-2012]

C

10 JULY 2014

CIVIL PROCEDURE: *Action - Res judicata - Previous suit similar in nature - Issuance of possession order and writ of possession to opposing party - Whether valid and subsisting - Doctrine of res judicata - Whether*

D *applicable*

CIVIL PROCEDURE: *Parties - National Land Code, proceedings under - Possession - Recovery of - Originating summons - Fourth plaintiff not named as defendant - Filing of affidavit in opposition - Objection by opposing party - Whether proper application made by fourth*

E *plaintiff to be joined as defendant - Rules of the High Court 1980, O. 89 r. 5*

The appellants ('plaintiffs'), on behalf of themselves and all other occupiers of Lot 16, filed an application in the High Court

F ('present suit') for a declaration that the issuance of the provisional lease by the second and/or third defendants, *ie,* the Superintendent of Lands and Surveys Bintulu Division and the Government State of Sarawak to the respondent ('first defendant') was unlawful and null and void as it impaired the plaintiffs' native

G customary rights ('NCR'). The plaintiffs also applied for a prohibitory injunction to restrain the first defendant from trespassing and commencing their development project on the plaintiffs' NCR land. Back in 1999, the plaintiffs commenced an action against Borneo Pulp Plantations Sdn Bhd and the

H Superintendent of Lands and Surveys Bintulu in Kuching ('the first suit'). *Vide* the first suit, the plaintiffs' claim for NCR over the same land as claimed by them in the present suit was allowed by the High Court. However, on appeal, the Court of Appeal allowed the defendants' appeal and the plaintiffs' application for leave to

I the Federal Court was dismissed. On 18 December 2008, the first

defendant in the present suit filed an originating summons ('the OS') seeking to recover possession of Lot 16 under O. 89 of the Rules of the High Court 1980 ('RHC'). The fourth plaintiff on behalf of himself and all the persons in occupation of Lot 16 opposed the OS. However, the affidavit in opposition of the fourth plaintiff was objected by the first defendant due to non-compliance with O. 89 r. 5 of the RHC. As the fourth plaintiff was not named as a defendant in the OS, it was submitted that the said plaintiff must file a proper application to be joined as a defendant. The High Court then granted the possession order in favour of the first defendant and the plaintiffs' appeal to the Court of Appeal against this decision was struck out. Following that, a writ of possession was issued directing the sheriff of the High Court to enter Lot 16 and to execute the writ of possession. The plaintiffs refused to give possession of the land and instead, filed the present suit. The High Court granted an *ex parte* injunction order to restrain the first defendant from commencing their development project on Lot 16 and after the *inter partes* hearing, the injunction order was extended until determination of the suit. The Court of Appeal, however, set aside the injunction order. In the present suit, the first defendant filed an application under O. 14A and O. 18 r. 19 of the RHC and the question of law posed for determination was whether the plaintiffs' action was *res judicata* and/or barred by issue estoppel as a result of the first suit, the Court of Appeal's decision and the decision in the OS. The learned Judicial Commissioner ruled that as a result of the possession order and the writ of possession, the plaintiffs' action was *res judicata* and/or barred by issue estoppel. As a result, the plaintiffs' action was struck out and hence, this appeal.

Held (dismissing appeal with costs)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The possession order and the writ of possession remained valid and subsisting. The cause of action in the writ of possession and the present action was not different in nature. The fact that the plaintiffs must be made a party in the writ of possession for the doctrine of *res judicata* to apply was misconceived. The plaintiffs' rights on Lot 16 had merged in the possession order made in the OS and in the execution of the same, *vide* the writ of possession. The writ of possession

A did not entail any hearing and it was a mode of execution to enforce the possession order. Hence, the appropriate proceeding where the plaintiffs ought to be made a party would be during the hearing of the OS. Further, if the OS has not been heard on the merits, it was open to the plaintiffs to
B make the necessary application to set aside the possession order. In any event, the appeal against the possession order was struck out by the Court of Appeal. (paras 20, 21, 23 - 26)

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu ('plaintif-plaintif'), bagi pihak diri mereka dan penghuni-penghuni Lot 16, telah memfailkan permohonan ke Mahkamah Tinggi ('guaman ini') untuk deklarasi bahawa
D pengeluaran pajakan sementara oleh defendan-defendan kedua dan/ atau ketiga, iaitu, Penguasa Jabatan Tanah dan Ukur Bintulu dan Kerajaan Negeri Sarawak kepada responden ('defendan pertama') adalah tidak sah dan terbatal memandangkan ia menjejaskan hak adat anak negeri ('NCR') plaintif-plaintif. Tambahan, pihak plaintif
E juga telah memohon untuk injunksi larangan bagi menghalang defendan pertama daripada menceroboh dan memulakan projek pembangunan di atas tanah NCR plaintif-plaintif. Pada tahun 1999, plaintif-plaintif telah memulakan tindakan terhadap Borneo Pulp Plantations Sdn Bhd dan Penguasa Jabatan Tanah dan Ukur
F Bintulu di Kuching ('guaman pertama'). Melalui guaman pertama, tuntuan NCR pihak plaintif atas tanah yang dituntut dalam guaman ini telah dibenarkan oleh Mahkamah Tinggi. Walau bagaimanapun, Mahkamah Rayuan telah membenarkan rayuan pihak defendan dan permohonan plaintif-plaintif untuk kebenaran
G ke Mahkamah Persekutuan ditolak. Pada 18 Disember 2008, defendan pertama dalam guaman ini telah memfailkan saman pemula ('SP') untuk memperolehi milikan tanah Lot 16 di bawah A. 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif keempat bagi pihak dirinya dan penghuni-penghuni Lot 16
H menentang SP itu. Walau bagaimanapun, defendan pertama telah membantah afidavit balasan plaintif keempat atas alasan ketidakpatuhan kepada A. 89 k. 5 KMT. Memandangkan plaintif keempat tidak dinamakan sebagai defendan dalam SP, adalah dihujahkan bahawa plaintif tersebut sepatutnya memfailkan
I permohonan yang sewajarnya untuk ditambah sebagai defendan.

Mahkamah Tinggi telah memberikan perintah pemilikan berpihak kepada defendan pertama dan rayuan plaintif-plaintif ke Mahkamah Rayuan terhadap keputusan ini dibatalkan. Berikutan itu, satu writ pemilikan telah dikeluarkan mengarahkan sherif Mahkamah Tinggi untuk memasuki Lot 16 dan melaksanakan writ pemilikan. Plaintif-plaintif enggan memberikan milikan tanah itu dan telah memfailkan guaman ini. Mahkamah Tinggi telah membenarkan injunksi *ex parte* untuk menghalang defendan pertama dari memulakan projek pembangunan atas Lot 16 dan selepas pendengaran *inter partes*, perintah injunksi telah dilanjutkan sehingga penyelesaian guaman. Mahkamah Rayuan, walau bagaimanapun, telah mengenepikan perintah injunksi itu. Dalam guaman ini, defendan pertama telah memfailkan permohonan di bawah A. 14A dan A. 18 k. 19 KMT dan soalan undang-undang, yang diutarakan untuk pertimbangan adalah sama ada tindakan plaintif-plaintif merupakan *res judicata* dan dihalang oleh isu estopel disebabkan guaman pertama, keputusan Mahkamah Rayuan dan SP. Yang arif Pesuruhjaya Kehakiman memutuskan bahawa disebabkan perintah pemilikan dan writ pemilikan, tindakan plaintif-plaintif adalah *res judicata* dan/atau dihalang oleh isu estopel. Tindakan plaintif dibatalkan dan oleh itu, rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Perintah pemilikan dan writ pemilikan kekal sah dan masih berkuatkuasa. Kausa tindakan dalam writ pemilikan dan guaman ini tidak berbeza. Fakta bahawa, untuk doktrin *res judicata* terpakai plaintif-plaintif mesti dimasukkan sebagai pihak dalam writ pemilikan, merupakan suatu salah tanggapan. Hak pihak plaintif atas Lot 16 telah dicantumkan dengan perintah pemilikan yang dibuat dalam SP dan pelaksanaannya melalui writ pemilikan. Writ pemilikan tidak memerlukan pendengaran dan ia merupakan suatu cara pelaksanaan untuk menguatkuasakan perintah pemilikan. Oleh itu, prosiding yang sesuai di mana plaintif-plaintif sepatutnya dijadikan sebagai pihak adalah semasa pendengaran SP. Tambahan, jika SP tidak didengar berdasarkan merit, adalah terbuka kepada plaintif-plaintif untuk membuat permohonan yang sewajarnya bagi mengenepikan perintah pemilikan. Walau bagaimanapun, rayuan terhadap perintah pemilikan telah pun dibatalkan oleh Mahkamah Rayuan.

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(foll)***

Nor Nyawai & Ors v. Borneo Pulp & Paper Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Tara Rajaratnam v. Datuk Jaginder Singh & Ors [1980] 1 LNS 131 FC ***(refd)***

Legislation referred to:

Land Code (Sarawak)(Cap 81), s. 202
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 14A, O. 18 rr. 5, 19, O. 89

For the appellant - Baru Bian (Simon Siah Sy Jen & Chua Kuan Ching with him); M/s Baru Bian, Advocs

For the respondent - Leonard David Shim (Wung Duk Ying with him); M/s Reddi & Co, Advocs

[Editor's note: For the High Court judgment, please see Nor Nyawai & Ors v. Tatau Land Sdn Bhd & Ors [2012] 8 CLJ 956.]

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun JCA:

[1] This is the plaintiffs' appeal against the decision of the Bintulu High Court in allowing the first defendant's application to strike out the plaintiffs' writ of summons and statement of claim. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] The background facts relevant to the appeal are as follows. The dispute concerns Lot 16, Block 3, Sangan Land District, Bintulu. *Vide* the present action, the plaintiffs on behalf of themselves and all other occupiers, holders and claimants of Native Customary Right (NCR) Land at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak, claimed against the defendants, *inter alia* for a declaration that the issuance of the provisional lease

by the second and/or the third defendants to the first defendant is unlawful and null and void as it impairs the plaintiffs' NCR and for a prohibitory injunction restraining the first defendant and/or their employees servants and/or agents from trespassing, clearing, using or occupying and commencing their development project on the plaintiffs' NCR land.

[3] In 1999, the same plaintiffs herein had commenced an action against Borneo Pulp Plantations Sdn Bhd; Borneo Pulp & Paper Sdn Bhd and the Superintendent of Lands and Surveys Bintulu in Kuching (Suit No. 22-28-99-1) ('the first suit'). In the first suit, the plaintiffs had claimed NCR over the same lands as claimed by the plaintiffs in the present suit which are Rumah Luang/Rumah Nor in Sungai Sekabai, Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu Division, Sarawak (see para. 3(a) of the statement of claim in the first suit, p. 58 RR1(A) and p. 116 RR 11 (B&C)). The area that the plaintiffs claimed in the first suit was more particularly set out in the map marked "A" and edged in red which was annexed to the statement of claim therein.

[4] On 12 May 2001, the High Court, Kuching gave judgment in favour of the plaintiffs in the first suit. Justice Ian Chin made an order, *inter alia*:

> (d) the disputed area is to be reckoned by reference to the map admitted in evidence during the trial as exhibit P172 following as closely as possible the boundary of the disputed area that has been marked on the map.

[5] By reference to exh. P172 in the first suit, Lot 16 clearly falls outside the boundary of the area which the plaintiffs claimed to have acquired NCR.

[6] Aggrieved by the decision of the High Court, the defendants in the first suit appealed to the Court of Appeal (Civil Appeals No. Q-01-42-2001 & Q-20-504-2001). On 8 July 2005, the Court of Appeal allowed the appeal. The plaintiffs' application for leave to the Federal Court was dismissed.

[7] On 18 December 2008, the first defendant in the present action filed an Originating Summons No. 24-74-2008 ('the OS') seeking to recover possession of Lot 16 under O. 89 of the Rules of the High Court 1980. The defendants in the OS were "The Persons in Occupation of Lot 16, Block 3 Sangan Land District, Ulu Tatau, Bintulu Division, Sarawak".

[8] The fourth plaintiff on behalf of himself and all the persons in occupation of Lot 16, opposed the OS. However, the affidavit in opposition of the fourth plaintiff was objected to by learned counsel for the first defendant on the ground of non-compliance with O. 89 r. 5 of the Rules of the High Court 1980 which provides:

> Without prejudice to Order 15, rules 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard on the question whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant.

[9] As the fourth plaintiff was not named as a defendant in the OS, it was submitted by learned counsel for the first defendant, *inter alia*, that the fourth plaintiff must make a proper application to be joined as a defendant, which the fourth plaintiff had failed to do (pp. 149-154 ROA II (Pt B&C)).

[10] On 20 November 2009, the High Court granted the possession order to the first defendant. From the order (pp. 139-140 ROA II (part B&C)), it appears that the affidavit in opposition was not considered after all. Be that as it may, there was no application for stay of the possession order by any person in occupation of Lot 16, although an appeal was filed by the plaintiffs on 17 December 2009 against the decision of the learned Judicial Commissioner in granting the possession order (p. 91 ROA II (part B&C)). On 16 April 2009, the Court of Appeal struck out the said appeal.

[11] Following the possession order, the first defendant, *vide* application for Execution No. 38-01-2009 applied for a writ of possession. Pursuant to the application, the writ of possession was issued on 10 December 2009, directing the sheriff of the High Court Bintulu to enter Lot 16 and to execute the writ of possession.

[12] On 19 January 2010, when the bailiffs went to Lot 16 to execute the writ of possession, some persons in occupation of Lot 16 requested the bailiff to give them three days to vacate the said land. The bailiff acceded to the said request. A

[13] Possession of Lot 16 was not given to the first defendant after the three days. Instead, on 22 January 2010 the plaintiffs filed the present action where the plaintiffs prayed for several declarations and applied for an injunction, essentially to restrain the first defendant from commencing their development project on Lot 16. The High Court granted an *ex parte* injunction on 26 January 2010 and after an *inter partes* hearing, the injunction order was extended until the determination of the suit. B C

[14] The first defendant filed an appeal to the Court of Appeal against the injunction order. On 17 November 2011, the Court of Appeal allowed the appeal and set aside the injunction (pp. 143-144 RRII (part B&C)). D

[15] On 9 February 2012, the first defendant took out an application under O. 14A and O. 18 r. 19 of the Rules of the High Court 1980 for the determination of the following questions of law: E

(i) Whether the plaintiffs' action is *res judicata* and/or barred by issue estoppel as a result of the High Court Suit No. 22-28-99-1 between *Nor Nyawai & Ors v. Borneo Pulp & Paper Sdn Bhd & Ors* [2001] 2 CLJ 769 and the Court of Appeal's decision in Civil Appeals No. Q-1-42-2001 & Q-20-504-2001 and the decision in the OS; F

(ii) Whether the plaintiffs' claim and the reliefs sought are barred by reason of s. 2 of the Public Authorities Protection Act 1948 and/or item 97 of the Schedule to the Limitation Ordinance (Cap 49) and/or s. 202 of the Land Code 1958 (Cap 81); G

(iii) Whether the plaintiffs' action is maintainable as the plaintiffs ought to have filed an action by way of judicial review of the administrative action of the issuance of the documents of title to Lot 16; and H

I

A (iv) Whether the plaintiffs could apply for or be entitled to the remedies, reliefs or orders prayed for in the statement of claim as against the first defendant's title which is indefeasible.

[16] The learned Judicial Commissioner held, in particular, that as
B a result of the possession order and the writ of possession, the plaintiffs' action herein is *res judicata* and/or barred by issue estoppel. Consequently, the plaintiffs' writ of summons and the statement of claim was struck out, hence the plaintiffs' appeal before us.

C

The Appeal

[17] There was only one ground of appeal raised by learned counsel for the plaintiffs ie, that the learned Judicial Commissioner erred in finding that the plaintiffs' action herein is *res judicata* and/
D or barred by issue estoppel as a result of the possession or writ of possession.

[18] Learned counsel relied on the case of *Tara Rajaratnam v. Datuk Jaginder Singh & Ors* [1980] 1 LNS 131; [1981] 1 MLJ
E 232 where Wan Suleiman FCJ said:

> To invoke the doctrine of *res judicata* the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also the matter directly and substantially in issue has been heard and finally
F decided by the court which heard it.

[19] In the instant case, learned counsel submitted that the plaintiffs failed to oppose the possession order purely on technical ground or procedural ground. And since the issue or merits of the
G action has not been heard, learned counsel submitted that the plea of *res judiciata* is not sustainable.

[20] It was further the submission for the plaintiffs that the cause of action in the writ of possession and the present action is different in nature because the writ of possession was allowed on
H the ground that the first defendant was the holder of the provisional lease without taking into consideration that the issuance of the provisional lease is conditional upon a survey whereas in the present action, the plaintiffs' claim is for a declaration that the plaintiffs' have native customary rights over
I part of the provisional lease.

[21] We were not able to agree with learned counsel for the plaintiffs. In *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, Peh Swee Chin FCJ said:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect or creating an estoppel *per rem judicatum*. When a matter between two parties had been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; ...
>
> ...
>
> ... there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
>
> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, i.e. the cause of action, merges into the said final judgment, in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*.
>
> ...
>
> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a final judgment in which they, or their privies, were parties.

[22] The learned FCJ further said that:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or

A inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ... . We are of the opinion that the aforesaid contrary view is to be preferred ...

B

[23] We accepted that the plaintiffs were not specifically named in the writ of possession. However, we were of the view that the argument of learned counsel that the plaintiffs must be made a party in the writ of possession for the doctrine of *res judicata* to
C apply, is misconceived.

[24] It must be highlighted that the writ of possession did not entail any hearing. The writ of possession was a mode of execution to enforce the possession order. The writ of possession
D was issued by an officer of the registry, upon payment of the necessary praecipe. Upon issuance of the same, the sheriff/bailiff will enter the property to effect execution. Hence, the appropriate proceedings where the plaintiffs ought to be made a party would be during the hearing of the OS. The plaintiffs did in fact take
E steps to oppose the OS by filing the affidavit in opposition and the matter was heard in the presence of the solicitor acting for the plaintiffs (see possession order at pp. 139-140 ROA II (part B & C)).

F **[25]** If it were the plaintiffs' contention that the OS had not been heard on the merits, in our view, it was open to the plaintiffs to make the necessary application to set aside the possession order. In any event, the plaintiffs had appealed to the Court of Appeal against the possession order, which appeal, as mentioned above,
G was struck out by the Court of Appeal.

[26] Applying the principle on the doctrine of *res judicata* as set out above and also in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, and based on the foregoing facts, in particular that the possession order and the writ of
H possession remains valid and subsisting, we were of the view that the plaintiffs' rights on Lot 16 had merged in the possession order made in the OS and in the execution of the same, *vide* the writ of possession.

I

[27] In light of the foregoing, we were unanimous in our views that there was no merit in the plaintiffs' appeal. We found no error in the judgment of the learned Judicial Commissioner which warrants appellate intervention. In the circumstances the appeal was dismissed. We ordered costs of RM5,000 to be paid by the appellants to the respondent and the deposit to be refunded to the appellants.